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KETUA PENGARAH HASIL DALAM NEGERI v. ALCATEL-LUCENT MALAYSIA SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
AZHAR MA'AH JCA
B ALIZATUL KHAIR OSMAN JCA
[CIVIL APPEAL NO: W-01-428-2010]
29 SEPTEMBER 2015

C ***ADMINISTRATIVE LAW:*** *Judicial review – Application for – Payments for services to non-resident company – Whether subject to withholding tax – Whether director general of inland revenue (DGI) correct in imposing withholding tax on respondents under ss. 109 and/or 109B of Income Tax Act 1967 – Whether DGI acted unreasonably in failing to provide reasons for imposing withholding tax – Whether DGI failed to specify provisions applied in imposing withholding tax –* D *Whether payments by respondents were royalty or for services rendered*

The second respondent was a non-resident company operating a global network for communications. By virtue of a service agreement, the second respondent agreed to allow the first respondent to have connection to access its global services. Payments were made to the second respondent for E services provided by the latter but the first respondent did not make any provision for withholding tax under s. 109 Income Tax Act 1967 ('ITA') as he was of the view that the said tax was not applicable as the said payments were for services performed from outside Malaysia. After a withholding tax audit was conducted at the first respondent's business premises, it was F discovered that no withholding tax was paid by the first respondent in respect of the payments made to the second respondent. Thus, the appellant informed the first respondent that it had omitted to pay withholding tax in respect of payments made to a non-resident company for the years of assessment 2001 to 2005 totalling RM4,891,747 and demanded the said G amount. After several negotiations, the amount of withholding tax was subsequently reduced to RM1,507,674.80. The appellant treated the payments made by the first respondent to the second respondent as royalty and subject to payment of withholding tax under ss. 109 and/or 109B of the ITA. However, the first respondent maintained that the said payments were H not royalty and not subject to withholding tax as they were payments made to a non-resident company for services wholly performed outside Malaysia. As such, the first respondent sought clarification from the appellant as to which withholding tax provisions under the ITA applied to the specific payments. The appellant failed to state which particular provisions of the ITA applied to payments made by the first respondent but insisted that the I first respondent pay the withholding tax. The first respondent reluctantly

paid the withholding tax under protest and challenged the decision of the appellant by way of judicial review in a joint application with the second respondent. The High Court allowed the respondents' application for judicial review and further held that the payments for the services were not royalty and therefore not subject to withholding tax. Hence, the appellant appealed against the decision of the High Court.

Held (dismissing appeal with costs)
Per Abu Samah Nordin JCA delivering the judgment of the court:

(1) There is a clear distinction between judicial review and appeal. Appeal is concerned with the merits of the case. Appeals lie on facts and law. Such rights of appeal are statutory and the courts possess no inherent appellate jurisdiction. Review, by contrast, is not concerned with the merits of the decision but with the validity of the decision-making process. Where a public decision maker fails to provide reasons for his decisions, the courts are at liberty to conclude that the public decision maker has no good reasons in making his decision. (para 21)

(2) Sections 109 and 109B of the ITA are distinctly different and each section deals with different subject matters. In the circumstances of the case, the appellant had acted unreasonably by invoking both ss.109 and 109B of the ITA in deciding that the payments were royalty within the meaning of s. 2 of the ITA. The appellant had also taken into consideration irrelevant matters by relying on the unsigned draft agreement in arriving at his decision. It is irrelevant and cannot form the basis of the appellant's decision. The appellant had not only acted unreasonably in the circumstances of the case but had committed an error of law and exceeded his statutory power by relying on both sections of the ITA. (paras 18, 24-25 & 30)

(3) The appellant was indecisive and could not make up his mind as to which particular section of the ITA applies in respect of payments for the 'leased communication facilities'. So, he invoked both sections. This was a clear cut case in which the appellant had made a decision arbitrarily in exercise of his statutory power to the detriment of the first respondent. Any doubt as to the applicable provision of the taxing statute must be held in favour of the taxpayer. (paras 26 & 27)

(4) A decision of an inferior tribunal which took into consideration irrelevant matters or disregarded relevant matters was amenable to judicial review and liable to be set aside. Since the appeal is dismissed, it was not necessary to decide on the merits whether the payments made by the first respondent to the second respondent were in law royalty within the meaning of s. 2 of the ITA. (paras 30 & 31)

Bahasa Malaysia *Translation Of Headnotes*

Responden kedua, adalah sebuah syarikat bukan pemaustatin yang mengendalikan sebuah rangkaian global untuk komunikasi. Menurut satu perjanjian perkhidmatan, responden kedua bersetuju untuk membenarkan responden pertama memperolehi akses terhadap perkhidmatan globalnya. Bayaran telah dibuat kepada responden kedua untuk perkhidmatan yang disediakan tetapi responden pertama tidak membuat sebarang peruntukan bagi cukai pegangan di bawah s. 109 Akta Cukai Pendapatan 1967 ('ITA') kerana beliau berpendapat bahawa cukai tersebut tiada kaitan kerana bayaran dibuat bagi perkhidmatan yang dilakukan dari luar Malaysia. Selepas audit cukai pegangan dijalankan di premis perniagaan responden pertama, didapati bahawa tiada cukai pegangan dibayar oleh responden pertama berkenaan bayaran yang dibuat kepada responden kedua. Oleh itu, perayu memaklumkan responden pertama mengenai kegagalannya untuk membayar cukai pegangan bagi bayaran yang dibuat kepada syarikat bukan pemastautin bagi tahun-tahun taksiran 2001 sehingga 2005 berjumlah RM4,891,747 dan menuntut amaun tersebut. Selepas beberapa rundingan, jumlah cukai pegangan kemudiannya dikurangkan kepada RM1,507,674.80. Perayu telah menganggap bayaran yang dibuat oleh responden pertama kepada responden kedua sebagai royalti dan tertakluk kepada bayaran cukai pegangan di bawah ss. 109 dan/atau 109B ITA. Walau bagaimanapun, responden pertama menegaskan bahawa bayaran tersebut bukan royalti dan tidak tertakluk kepada cukai pegangan kerana ia bayaran yang dibuat kepada syarikat bukan pemastautin untuk perkhidmatan yang dilakukan sepenuhnya di luar Malaysia. Oleh itu, responden pertama telah meminta penjelasan daripada perayu berkenaan peruntukan cukai pegangan di bawah ITA diguna pakai terhadap bayaran tersebut. Perayu gagal menyatakan peruntukan yang diguna pakai di bawah ITA untuk bayaran yang dibuat oleh responden pertama tetapi mendesak responden pertama menjelaskan bayaran cukai pegangan tersebut. Responden pertama, dengan berat hati menjelaskan bayaran pegangan tersebut dengan bantahan dan mencabar keputusan perayu melalui semakan kehakiman dalam satu permohonan bersama-sama dengan responden kedua. Mahkamah Tinggi telah membenarkan permohonan responden-responden untuk semakan kehakiman dan seterusnya memutuskan bahawa bayaran perkhidmatan tersebut bukan royalti dan oleh itu tidak tertakluk kepada cukai pegangan. Oleh itu, perayu merayu terhadap keputusan Mahkamah Tinggi.

Diputuskan (menolak rayuan dengan kos)
Oleh Abu Samah Nordin HMR menyampaikan penghakiman mahkamah:

(1) Terdapat perbezaan yang jelas antara semakan kehakiman dan rayuan. Rayuan adalah berkenaan dengan merit kes. Rayuan terletak pada fakta dan undang-undang. Hak-hak rayuan adalah statutori dan mahkamah

tidak mempunyai bidang kuasa rayuan sedia ada. Semakan kehakiman, sebaliknya, tidak mementingkan merit keputusan tetapi dengan kesahihan proses membuat keputusan. Jika seseorang pembuat keputusan awam gagal memberi alasan untuk keputusan yang dibuat, mahkamah boleh membuat kesimpulan bahawa pembuat keputusan awam tersebut tidak mempunyai alasan yang baik dalam membuat keputusannya.

(2) Seksyen 109 dan s. 109B ITA jelas berbeza dan setiap seksyen menguruskan perkara yang berbeza. Dalam hal keadaan kes, perayu bertindak secara tidak munasabah dengan mengguna pakai kedua-dua ss. 109 dan 109B ITA dalam memutuskan bahawa bayaran tersebut adalah royalti berdasarkan pengertian s. 2 ITA. Perayu juga mengambil kira perkara-perkara yang tidak relevan dengan bergantung kepada draf perjanjian yang tidak ditandatangani dalam mancapai keputusannya. Ia tidak relevan dan tidak boleh menjadi asas keputusan perayu. Perayu bukan sahaja bertindak tidak munasabah dalam hal keadaan kes tetapi juga melakukan kekhilafan undang-undang dan melebihi kuasa statutorinya dengan bergantung kepada kedua-dua seksyen ITA.

(3) Perayu teragak-agak dan tidak dapat membuat keputusan mengenai seksyen ITA yang mana terguna pakai terhadap bayaran untuk 'leased communication facilities'. Maka, perayu mengguna pakai kedua-dua seksyen. Ini adalah kes yang jelas di mana perayu telah membuat keputusan sewenang-wenangnya dalam menjalankan kuasa statutorinya dengan merugikan responden pertama. Apa-apa keraguan berkenaan peruntukan statut percukaian yang diguna pakai perlu berpihak kepada pembayar cukai.

(4) Sesuatu keputusan tribunal rendah yang mengambil kira perkara-perkara yang tidak relevan atau gagal mengambil kira perkara-perkara yang relevan boleh diperbetulkan melalui semakan kehakiman dan boleh diketepikan. Oleh kerana rayuan ini ditolak, tidak perlu untuk membuat keputusan atas merit sama ada bayaran yang dibuat oleh responden pertama kepada responden kedua dalam undang-undang adalah royalti mengikut pengertian s. 2 ITA.

Case(s) referred to:

Bharat Sanchar Nigam Ltd & Anor v. Union of India & Ors [2006] 3 SCC 1 ***(refd)***
Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***
CIT v. Davy Ashmore India Ltd [1991] 190 ITR 626 Cal ***(refd)***
CIT v. Sun Engineering Works Pvt Ltd [1992] 198 ITR 297 SC ***(refd)***
Commissioners of Inland Revenue v. Angus [1889] 23 QBD 579 ***(refd)***
Exxon Chemical (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 4 CLJ 810 CA ***(refd)***

General Electric Co Ltd v. Price Commission [1975] ICR 1 ***(refd)***
Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***
I Investment Ltd v. Comptroller-General Of Inland Revenue [1975] 1 LNS 61 FC ***(refd)***
Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor [2005] 3 CLJ 517 CA ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***
National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 BLJ 33 SC ***(refd)***
Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor [1981] CLJ 83; [1981] CLJ (Rep) 74 FC ***(refd)***
Pearlman v. Keepers & Governors of Harrow School [1979] QB 56 ***(refd)***
Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***
Preston v. Inland Revenue Commissioners [1985] 2 All ER 327 ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
Reg v. Inland Revenue Commissioners Ex parte National Federation of Self-Employed And Small Businesses Ltd [1982] AC 617 ***(refd)***
Reka Pacific Bhd v. Securities Commission & Anor and Other Appeals [2005] 2 CLJ 108 CA ***(refd)***
The Queen v. St John Shipbuilding & Dry Dock Co Ltd [1981] 1 FC 33 ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 2, 4A, 39(1)(f), (j), 106(1), 109(2), 109B(1)(a), (b), (c), (2), 140(5)
Rules of the High Court 1980, O. 53

For the appellant - Hazlina Hussain (Ahmad Khairuddin Abdullah with her); SFC
For the respondents - Goh Ka Im (Foong Pui Chi with her); M/s Shearn Delamore & Co

[Editor's note: For the High Court judgment, please see Alcatel-Lucent Malaysia Sdn Bhd & Anor v. Ketua Pengarah Hasil Dalam Negeri [2011] 4 CLJ 142.]

Reported by Sandra Gabriel

JUDGMENT

Abu Samah Nordin JCA:

[1] The issue in this appeal is whether the decision of the Director General of Inland Revenue ('the appellant') in treating the payments made by the first respondent to the second respondent, in consideration of certain services provided by the latter, as royalty and thus subject to payment of withholding tax under s. 109 and/or s. 109B of the Income Tax Act 1967 ('the ITA') is liable to be quashed by way of judicial review on the grounds that he had acted in excess of his powers under the ITA and/or without jurisdiction and/or unreasonably in the circumstances of the case.

[2] The appellant did not object to the respondents' application in the High Court to challenge his decision by way of judicial review instead of appealing to the Special Commissioners of Income Tax against his decision in treating the said payments as royalty.

[3] The facts are not in dispute. The second respondent is a non-resident. It operates a global network for voice, data and video communication. By a service agreement dated 1 January 2003, the second respondent agreed to allow the first respondent to have connection to its data traffic and to access the global services provided by the second respondent subject to payments at a fixed rate. Payments were made to the second respondent for services provided by the latter. But the first respondent did not make any provision for withholding tax under s. 109 of the ITA. The first respondent was of the view that s. 109 was not applicable as the said payments were for services performed from outside Malaysia and that all the servers for the network were located outside Malaysia.

[4] The appellant only discovered that no withholding tax was paid by the first respondent in respect of the payments made to the second respondent, after it conducted a withholding tax audit at the first respondent's business premises. Pursuant to the said auditing, the appellant by letter dated 31 October 2007 informed the first respondent that it had omitted to pay withholding tax in respect of payments made to a non-resident for the years of assessment 2001 - 2005 totalling RM4,891,747 and demanded that payment for that amount be made, failing which no deduction would be allowed under s. 39(1)(f) and (j) of the ITA and that the appellant would commence an action under s. 106(1) of the ITA to recover tax due and payable from the first respondent. After several meetings and exchanges of correspondence between the appellant and PricewaterhouseCoopers (the first respondent's tax agent) the amount of withholding tax was reduced to RM1,781,274. After further representation by the first respondent's tax agent, the appellant by letter dated 14 April 2008 finally reduced the amount of withholding tax to RM1,507,674.80.

[5] The appellant treated the payments made by the first respondent to the second respondent in consideration of services rendered by the latter as royalty and subject to payment of withholding tax under s. 109 and/or s. 109B of the ITA. The payments for services which the appellant considered as royalty and subject to withholding tax are particularised in Appendix 1 of the appellant's letter, which we reproduce below for convenience:

A Lampiran I

(i) Perbelanjaan SAP Licence and Maintenance Fees.

Bil	Tahun Kewangan Berakhir/ Tahun Taksiran	Belanja Yang Dituntut (RM)	Cukai Pegangan Yang Sepatutnya Dibayar (RM)	Kenaikan Cukai Pegangan (RM)	Catatan
1.	31.12.05/TT 2005	42,960	4,296.00	4,296.00	Seksyen 109, ACP 1967
2.	31.12.05/TT 2005	83,020	8,302.00	8,302.00	Seksyen 109, ACP 1967
Jumlah		125,980	12,598.00	12,598.00	

(ii) Perbelanjaan Utilities - Leased Communication Facilities

Bil	Tahun Kewangan Berakhir/ Tahun Taksiran	Belanja Yang Dituntut (RM)	Cukai Pegangan Yang Sepatutnya Dibayar (RM)	Kenaikan Cukai Pegangan (RM)	Catatan
4.	31.12.05/TT 2005	1,524,844	116,334.95	116,334.95	Seksyen 109 dan/atau 109B, ACP 1967
5.	31.12.05/TT 2004	1,426,444	108,827.72	108,827.72	Seksyen 109 dan/atau 109B, ACP 1967
6.	31.12.05/TT 2003	1,634,004	124,663.09	124,663.09	Seksyen 109 dan/atau 109B, ACP 1967
7.	31.12.05/TT 2002	1,721,736	131,356.43	131,35.43	Seksyen 109 dan/atau 109B, ACP 1967
8.	31.12.01/TT 2001	1,562,670	119,220.81	119,220.81	Seksyen 109 dan/atau 109B, ACP 1967
	Jumlah	7,869,698	600,403.00	600,403.00	

(iii) Bayaran Pelbagai kepada Pegawai Latihan, Pekerja Luar Malaysia dan sebagainya.

Bil	Tahun Kewangan Berakhir/ Tahun Taksiran	Belanja Yang Dituntut (RM)	Cukai Pegangan Yang Sepatutnya Dibayar (RM)	Kenaikan Cukai Pegangan (RM)	Catatan
9.	20.04.05/TT 2005	44,596	1,459.60	4,459.60	Seksyen 109 ACP 1967
10.	20.04.05/TT 2005	14,446	1,444.60	1,444.60	Seksyen 109 ACP 1967
11.	07.04.05/TT 2005	236,949	23,694.90	23,694.90	Seksyen 109 ACP 1967
19.	22.12.05/TT 2005	1,000,497	100,049.70	100,049.70	Seksyen 109 ACP 1967
20.	29.11.05/TT 2005	111,876	11,187.60	11,187.60	Seksyen 109 ACP 1967
	Jumlah	1,408,364	140,836,40	140,836.40	

[6] Learned counsel for the appellant explained that the amount of RM1,507,674.80 was arrived at as follows:

(i) Perbelanjaan SAP Licence and Maintenance Fees

(a) Withholding tax - RM 12,598.00

(b) Increased Withholding tax - RM 12,598.00

Total RM 25,196.00

(ii) Perbelanjaan Utilities - Leased Communication Facilities.

(a) Withholding tax - RM 600,403.00

(b) Increased Withholding tax - RM 600,403.00

Total RM1,200,806.00

(iii) Bayaran Pelbagai kepada Pegawai Latihan, Pekerja Luar Malaysia dan sebagainya

(a) Withholding tax - RM 140,836.40

(b) Increased Withholding tax - RM 140,836.40

Total RM 281,672.80

Total amount: (i) + (ii) + (iii) = RM1,507,674.80.

The increased withholding tax was payable under either section 109(2) or section 109B(2) of the ITA.

[7] The first respondent maintained its view that the above said payments were not royalty and not subject to withholding tax as they were payments made to a non-resident for services wholly performed outside Malaysia. Thus, by letter dated 11 April 2008, the first respondent sought clarification from the appellant as to which withholding tax provisions under the ITA apply to the specific payments as listed in Appendix 1. The appellant in his reply letter dated 14 April 2008 did not however state which particular provisions of the ITA apply to payments made by the first respondent but insisted that the first respondent pay the withholding tax. The first respondent reluctantly paid the withholding tax under protest and challenged the decision of the appellant by way of judicial review.

[8] In its joint application with the second respondent for judicial review under O. 53 of the Rules of the High Court 1980 they sought the following reliefs:

(a) an order of *certiorari* to quash the appellant's decision, contained in the appellant's letter dated 14 April 2008 ("the decision") that the payments made by the first respondent to the second respondent in the years of assessment 2001 to 2005, for services provided by the second respondent to the first respondent relating to the provision of a global network for voice, data and video communication referred to under the sub-heading "Perbelanjaan Utilities - Leased Communication Facilities" in the appellant's letter, are subject to withholding tax under ss. 4A and 109B and/or s. 109 of the Income Tax Act 1967 ("ITA") and are further subject to increased withholding tax under ss. 109(2) and/or 109B(2) of the ITA;

(b) a declaration that the appellant's decision is erroneous in law and that the payments are not subject to withholding tax or increased withholding tax under ss. 4A and 109B and/or 109 of the ITA;

(c) a declaration that, in the event the first respondent is liable to payment of an increased withholding tax under ss. 109(2) and/or 109B(2) of the ITA, which the respondents deny, the appellant's basis of computing such an increase is excessive and erroneous;

(d) an order of prohibition to prohibit the appellant from taking any further proceedings arising from the appellant's decision or any similar decision or finding of the appellant in regard to payments by the first respondent to the second respondent;

(e) an order of *mandamus* to compel the appellant to refund to the first respondent the withholding tax and increased withholding tax in the sum of RM1,200,806 which were withheld and remitted under protest to the appellant on 28 April 2008, and any and all overpayments of withholding tax, debts, increases of tax arising from the grant of any relief by this honourable court; and

(f) costs.

[9] The grounds upon which the above reliefs are sought are stated in the first respondent's affidavit affirmed on 23 May 2008. Briefly, the first respondent alleged that the appellant had acted in excess of and/or without jurisdiction or unreasonably in that he:

(a) failed to exercise his statutory power fairly and in accordance with the rules of natural justice;

(b) failed to take into account relevant considerations;

(c) took into account irrelevant considerations;

(d) acted in excess of the jurisdiction and/or powers under the ITA;

(e) had abused and/or misused and/or failed to use his discretion; and

(f) failed to give any basis or reasons as to why the payments for the services were subject to withholding tax.

[10] The High Court allowed the respondents' application for judicial review and further held that the payments for the services were not royalty and therefore not subject to withholding tax for the following reasons:

> (18) The Respondent avers that the Respondent had explained to the Applicant *vide* the letters exhibits PC-5, PC-7 and PC-9 that there was non-compliance with regard to withholding tax for the Payments made as royalties. A perusal of the three letters referred to shows that both sections 109 and 109B ITA were mentioned. I agree with counsel for the Applicants that sections 109 and 109B refers to two different scenarios where withholding tax is imposed. The documents produced show that the first time that the Respondent informed the Applicants that the Payments were royalties and were therefore subject to withholding tax was *vide* the Respondent's affidavit in reply enclosure 14. In my opinion there was failure on the part of the Respondent to give due consideration to relevant matters at the material time when making the decision that the Payments were royalties and subject to withholding tax. Public interest demands that a statutory power must be exercised reasonably and with due consideration. I agree with counsel for the Applicants that in the circumstances of this case it was unreasonable of the Respondent to apply both sections 109 and 109B. I find that applying both sections 109 and 109B renders the Respondent's decision unreasonable.
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> (19) The Respondent relied on Article 2 of the unsigned draft agreement exhibit AP-2 to support the contention that the Payments were subject to withholding tax by virtue of being royalty payments. However as submitted by counsel for the Applicants and with whom I agree, the Respondent had relied on an incorrect basis of fact since exhibit AP-2 is an unsigned agreement and relates to other years of assessment. Hence the Respondent's decision is fundamentally flawed.

(20) In the *Queen v. St John Shipbuilding & Dry Dock Co Ltd* [1981] 1 F.C 334 cited by counsel for the Applicants, the Federal Court of Appeal of Canada held:

> "Royalties", though a broad term, when used in the sense of a payment for the use of property, connotes a payment calculated by reference to the use or to the production or revenue or profits from the use of the rights granted. In *Jowitt's Dictionary of English Law* the term is defined thus:
>
> > Royalty, a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of the right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the right. See RENT.
> >
> > Royalty also sometimes means a payment which is made to an author or composer by an assignee or licensee in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent.

(21) In the present case there is no evidence to show that the Service Agreement was entered into by the Applicants with the intention of allowing the use of software by the 1st Applicant to produce profits. A perusal of the Agreement shows that it is an agreement by which the 2nd Applicant agreed to provide services to the 1st Applicant to facilitate access to the global network for voice, data and video communication to enable the 1st Applicant to connect to the worldwide telecommunication network. There is no evidence that the Payments were made for the grant of rights by the 2nd Applicant to the 1st Applicant to develop commercially or exploit the software. On the contrary the Service Agreement shows that any payment for software was necessary for the acquisition of the 2nd Applicant's services required by the 1st Applicant for the 1st Applicant's business. In the Applicant's affidavit in reply affirmed by Darren Matthew Ridge it averred *inter alia* as follows (paragraph 14 enclosure 15):

> The Second Applicant being a mere remote telecommunication service provider never developed or exploited any rights to use of any kind and payments made by the First Applicant to the Second Applicant in years of assessment 2001 to 2005 were specifically only for the Services provided by the Second Applicant to the First Applicant.

Hence I agree with the Applicants that the Respondent erred in its conclusion that the Payments were royalties. The Respondent had failed to read the Service Agreements as a whole. In my opinion the decision of the Respondent that the Payments were subject to withholding tax on the ground that the Payments were royalties is a decision that no

reasonable decision-maker similarly circumstance would have come to. For the reasons stated I allowed the Application with costs of RM4,000.00 to the Applicants.

(The respondent referred to in the High Court is the appellant before us while the applicants in the High Court are the respondents before us).

[11] This is the appellant's appeal against the decision of the High Court. The appeal is based on two grounds. Firstly, whether the appellant had acted unreasonably in failing to give reasons why the payments were subject to withholding tax. Secondly, whether the payments were in fact and in law, royalty or for services rendered by the second respondent.

First Ground

[12] Learned counsel for the appellant submitted that this was not a case under s. 140(5) of the ITA where the appellant had to give reasons for his decision. Be that as it may, the appellant had in fact given reasons why the payments were subject to withholding tax at the several meetings between the appellant and the tax agent for the first respondent. The first respondent was given ample opportunity to put its case at those meetings held after the appellant conducted the audit at the first respondent's premises and before the appellant finally reduced the amount of withholding tax to RM1,507,674.80. On 25 July 2008 the appellant again informed the first respondent's tax agent why the payments were treated as royalty and subject to withholding tax.

[13] In our view s. 140(5) of the ITA is not applicable to the facts before us. There are ample authorities that where a public decision maker fails to provide reasons, the courts are at liberty to conclude that he has no good reasons in making his decision. Abdoolcader J (as he then was) in delivering the decision of the Federal Court in *Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor* [1981] CLJ 83; [1981] CLJ (Rep) 74; [1981] 2 MLJ 199 at p. 202, had endorsed what Lord Denning MR in *General Electric Co Ltd v. Price Commission* [1975] ICR 1, 12 said on the duty expected of the decision maker:

... The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation: see *Punton v. Ministry of Pensions and National Insurance* [1963] 1 WLR 186. And if the decision - making body has gone wrong in its interpretation, they can set its order aside: see *Ashbridge Investments Ltd v. Minister of Housing and Local Government* [1965] 1 WLR 1320 ... If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere: see *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1007, 1061. If the decision-making body comes to its decision on no

A evidence or comes to an unreasonable finding - so unreasonable that a reasonable person would not have come to it - then again the courts will interfere: see *Associated Provincial Picture House Ltd v. Wednesbury Corporation 1* [48] 1 KB 233. If the decision-making body goes outside its powers,, or misconstrues the extent of its power, then, too, the courts can interfere: see *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147. And, B of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside: see *Sydney Municipal Council v. Campbell* [1925] AC 338. In exercising these powers, the courts will take into account any reasons which the body may give for its decision. If it gives no reasons - in a case when it may reasonably be C expected to do so, the courts may infer that it has no good reason for reaching its conclusion and act accordingly. See *Padfield's* case [1968] AC 997, 1007, 1061.

See also *Reka Pacific Bhd v. Securities Commission & Anor and Other Appeals* [2005] 2 CLJ 108; [2005] 2 MLJ 269, *Kelab Lumba Kuda Perak v. Menteri* D *Sumber Manusia, Malaysia & Anor* [2005] 3 CLJ 517; [2005] 5 MLJ 193, *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 generally on the need to give reasons by public bodies or authorities in making their decisions.

E **Second Ground**

[14] Learned counsel for the appellant submitted that the payments fall within the definition of "royalty" in s. 2 of the ITA. "Royalty" as defined in the ITA includes:

F (a) any sums paid as consideration for the use of, or the right to use:

(i) copyrights, artistic or scientific works, patents, designs or models, plans, secret processes or formulate, trademarks or tapes for radio or television broadcasting, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been G or are to be used or reproduced in Malaysia or other like property or rights;

(ii) know-how or information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

H (b) …

As the first respondent was given the right to use the software under the service agreement and was not allowed to copy or modify the software without the authorisation of the second respondent, the payments made for the right to use the software fall within the definition of royalty under s. 2 I of the ITA and subject to withholding tax.

[15] Learned counsel relied, among others, on *Commissioner of Income Tax v. Davy Ashmore India Ltd* [1991] Vol 190 p. 626, *CIT v. Sun Engineering Works Pvt Ltd* [1992] SC Vol 198 p. 297 and *I Investment Ltd v. Comptroller-General Of Inland Revenue* [1975] 1 LNS 61; [1975] 2 MLJ 208 in support of her submission that the payments made by the first respondent to the second respondent were in the nature of royalty. It was submitted that the cases cited by learned counsel for the respondents including *Bharat Sanchar Nigam Ltd & Anor v. Union of India & Ors* [2006] 3 SCC 1 and *The Queen v. St John Shipbuilding & Dry Dock Co Ltd* [1981] 1 FC 334 were distinguishable and not relevant to the case in the instant appeal.

[16] The respondents' application for judicial review is confined to payments for services relating to leased communication facilities totalling RM1,200,806. They said that it was wrong for the appellant to treat the payments as royalty and subject to withholding tax when such payments were paid to a non-resident for services performed outside Malaysia.

[17] The respondents claimed that the first time the appellant disclosed to them that the payments were treated as royalty was in their affidavit-in-reply affirmed on 15 June 2009 after the respondents had filed their application for judicial review. Prior to that the word "royalty" was never stated anywhere in any of the appellant's letters asking the first respondent to pay withholding tax. The appellant's letter dated 25 July 2005 was written after the filing of the application for judicial review.

[18] The heading of the appellant's letter dated 14 April 2008 merely refers to s. 109/109B of the ITA. In Appendix 1 of the said letter, under the heading "leased communication facilities", the appellant again referred to "s. 109 and/or 109B" of the ITA. It was submitted that the appellant relied on both sections as he was unsure and could not make up his mind which particular section of the ITA apply to the payments made by the first respondent to the second respondent. Section 109 and s. 109B of the ITA are distinctly different and each section deals with different subject matter. Section 109 of the ITA speaks of liability to pay withholding tax in respect of interest or royalty whereas s. 109B(1)(a) speaks of liability of resident taxpayer to pay withholding tax to a non-resident for services rendered by the non-resident in connection with the use to property or his rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from such non-resident. Section 109B(1)(b) and (c) of the ITA are not relevant to the instant appeal.

[19] Learned counsel for both sides had submitted at length as to whether the payments made by the first respondent to the second respondent were in fact and in law, royalty.

[20] It is however apposite to remind us that what is before us is an appeal arising from the respondents' application for judicial review, among others, to quash the appellant's decision in treating the said payments as royalty and therefore subject to payment of withholding tax.

[21] There is a clear distinction between judicial review and appeal. Appeal is concerned with the merits of the case, in the sense that the appellate court can substitute its own opinion for that of the decision maker. Appeals lie on fact and law. Such rights of appeal are statutory and the courts possess no inherent appellate jurisdiction. Review, by contrast, is not concerned with the merits of the decision but with the validity of the decision-making process: see *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417, *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501, *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141. The Federal Court in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288 had clarified that the decision in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 that the court could substitute its own view to that of the Industrial Court should only be exercised in the most appropriate of cases. The same view was expressed in a subsequent decision of the Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1.

[22] In *Reg v. Inland Revenue Commissioners Ex parte National Federation of Self-Employed And Small Businesses Ltd* [1982] AC 617, Lord Wilberforce, at p. 632 of His Lordship's judgment said that the Inland Revenue was not immune from the process of judicial review; that a taxpayer would not be excluded from seeking judicial review if he could show that the revenue had either failed in its statutory duty toward him or had been guilty of some action which was an abuse of their powers or outside their power altogether.

[23] In *Preston v. Inland Revenue Commissioners* [1985] 2 All ER 327 the House of Lords once again held that the court could grant judicial review of the decision of the Inland Revenue Commissioners at the instance of a taxpayer if the commissioners failed to discharge their statutory duty to the taxpayer or if they abused or exceeded their powers. For the purposes of judicial review abuse of power included the unfair exercise of a statutory power if the commissioners' decision or action was equivalent to a breach of contract or a breach of representation giving rise to an estoppel. Lord Templeton at p. 337 said:

> Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers.

[24] We have considered the submissions by both sides and scrutinised the judgment of the learned judge. We dismissed the appeal with costs at the end of the hearing. We agreed with the decision of the learned judge and the grounds given by the learned judge in holding that in the circumstances of the case the appellant had acted unreasonably by invoking both ss. 109 and 109B of the ITA in deciding that the payments were royalty within the meaning of s. 2 of the ITA and that the appellant had taken into consideration irrelevant matters by relying on the unsigned draft agreement (exh. AP2) in arriving at his decision.

[25] Learned counsel for the appellant had unequivocally contended, in support of the appellant's affidavit-in reply, that the payments were in fact and in law, royalty and chargeable as withholding tax under s. 109 of the ITA. That was an implied admission that the payments were not chargeable under s. 109B of the ITA. In our judgment the appellant had not only acted unreasonably in the circumstances of the case but had committed an error of law and exceeded his statutory power by relying on both sections of the ITA.

[26] In *Pearlman v. Keepers And Governors of Harrow School* [1979] QB 56, Lord Denning said that "no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside jurisdiction and *certiorari* will lie to correct it". The appellant's letter dated 14 April 2008 and Appendix 1 to that letter clearly showed that the appellant relied on s. 109 as well as s. 109B of the ITA. As we have said earlier these sections are distinctly different and each section deals with different subject matter. The appellant was indeed indecisive and could not make up his mind as to which particular section of the ITA applies in respect of payments for the "leased communication facilities". So, he invoked both sections. The appellant's affidavit-in-reply states that the payments were in the nature of royalty. Learned counsel for the appellant before us also said the payments were royalty. But En Norhisham who appeared for the appellant in the High Court said that the payments were partly for royalty and partly for services. So, both sections apply. This was a clear cut case in which the appellant had made a decision arbitrarily in exercise of his statutory power to the detriment of the first respondent.

[27] Any doubt as to the applicable provision of the taxing statute must be held in favour of the taxpayer. In *Commissioners of Inland Revenue v. Angus* [1889] 23 QBD 579 Lord Esher said:

> Now, the first thing to be observed is that when the legislature assume to impose a tax on the subject, they must do so in clear and distinct terms; if the matter remains in doubt, the subject is entitled to judgment ... .

[28] We need only recite two local authorities in support of the proposition that where doubt exists, the court should rule in favour of the taxpayer. In *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 BLJ 33; [1994] 1 MLJ 99 the Supreme Court (as it then was) explained:

> There are ample authorities to show that Courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In *Re Micklewait* [1855] 11 Exch 452 it was held that a subject was not to be taxed without clear words. We realise that revenue from taxation is essential to enable the Government to administer the country and that the courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v. IRC* (*supra*):
>
> > ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...
> >
> > ... it has also been said by the Judicial Committee in *Oriental Bank Corporation v. Wright* [1880] 5 AC 845, 856 "that the intention to impose a charge upon a subject must be shown by clear and unambiguous language"

[29] In *Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2005] 4 CLJ 810; [2006] 1 MLJ 428 the Court of Appeal said:

> ... the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this : no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour …. The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally.

[30] There was a clear admission in the appellant's affidavit affirmed on 26 March 2010 that the appellant's decision was also based on the "customer services contract" (exh. AP2). Paragraph 4 of the affidavit said:

> 4. Selanjutnya saya menyatakan bahawa keputusan pihak Responden adalah berdasarkan perjanjian "Customer Services Contract" antara Alcanet International Asia Pacific Pte Ltd dan Alcatel Network System (Malaysia) Sdn Bhd. Sesalinan perjanjian tersebut dilampirkan dan ditandakan sebagai eksibit "AP-2".

With respect, the "customer services contract" was an unsigned draft agreement for services provided by the second respondent for the years prior to 2001 - 2005. It is irrelevant and cannot form the basis of the appellant's

decision. A decision of an inferior tribunal which took into consideration irrelevant matters or disregarded relevant matters is amenable to judicial review and liable to be set aside: *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1.

[31] For the abovesaid reasons, we dismissed the appeal by the appellant with costs. In view of our decision above, it was not necessary to decide on the merits whether the payments made by the first respondent to the second respondent were in law royalty within the meaning of s. 2 of the ITA.